Supreme Court, U.S.
FILED
MAY 7 2001
OFFICE OF THE CLERK

(3)

No. 00-1413

IN THE
Supreme Court of the United States

YSLETA DEL SUR PUEBLO, *et al*,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

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Come now Ysleta del Sur Pueblo, the Tigua Gaming Agency, the Tribal Council, Filbert Candelaria, and Francisco Hernandez (collectively, the "Pueblo") and file their Reply Brief to Respondent's Brief in Opposition, and would respectfully show unto the honorable Court as follows:

ARGUMENT

This is an interlocutory appeal dealing with one issue: the existence and extent of any congressional abrogation of the Pueblo's immunity with respect to the various causes of actions asserted by the State. In its Petition for Writ of Certiorari, the Pueblo raises three questions: (1) did Congress unequivocally express an intent to abrogate Petitioners' tribal-sovereign immunity from suit in section 1300g-6(c); (2)

did Congress condition the bringing of a suit under such abrogation, if any, upon the authorization by the state legislature; and (3) does the abrogation of immunity in section 1300g-6(c), if any, extend to state law causes of action? Despite the State's discussion of the matter, this appeal does not involve the scope of any federal prohibition of the Pueblo's gaming activities.

With respect to the first question raised in the Petition, the State misconstrues the Pueblo's argument concerning the interplay between section 1300g-4(f) and section 1300g-6. The Pueblo has never argued that Congress only enacted section 1300g-6 to permit the State to seek injunctive relief against tribes other than the Pueblo. Brief in Opposition, p. 9. Nor has the Pueblo argued that the provisions of sections 1300g-4(f) act as a limitation on the provisions of section 1300g-6. The Pueblo, instead, argues the exact opposite: "A reasonable interpretation of section 1300g-6(c) is that Congress has permitted the state to seek injunctive relief for violation of the federal gaming prohibition against those over whom the State would have had jurisdiction under section 1300g-4(f) if Congress had not preempted such jurisdiction under section 1300g-6(a)." Petition, p. 8. Those "over whom the state would have had jurisdiction" are *individuals* and not the Pueblo.

The State also mischaracterizes Tribal Resolution T.C.-02-86 as an "agreement" by the Pueblo to congressional abrogation of its immunity. Brief in Opposition, p. 5.[1] One may search the Resolution in vain for any mention of

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[1] *See Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325, 1328 n.2 (5th Cir. 1994), cert. denied, 514 U.S. 1016 (1995) (wherein the Resolution is set out in full).

lawsuits, consent to judgment, or any abrogation or waiver of immunity. It simply does not exist.[2]

The State misdescribes the third question raised in the Petition as a lack of capacity issue. It is not. A fair reading of the First Amended Complaint for Injunctive to Relief[3] reveals that the Attorney General brought a new, state law claim by requesting that the Pueblo be enjoined pursuant to chapter 125 of the Texas Civil Practices and Remedies Code (public and common nuisance). Petition, p. 6. While the State and the appellate court may be confused about the Pueblo's argument, it was not lost on the district court. Prior to addressing the lack of capacity issue, the district court refused to dismiss the state law claim. The district court erroneously construed section 1300g-6(b), which provides "Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas," as a valid grant by Congress "to the State of Texas to exercise regulatory authority over gambling on the Tribe's reservation". January Order fn. 5, *see* Petition, p. 23a. The court's construction is diametrically opposed to the intent clearly expressed by Congress in the statute, which is reason enough for this Court to issue its writ.

Other reasons for issuing the writ abound. The Pueblo has argued that neither this Court nor any other Courts of Appeals have traveled as far as the Fifth Circuit to find congressional abrogation of a Tribe's immunity from suit. The State offers no case law to contend otherwise. Since the test for determining whether Congress has abrogated tribal immunity

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[2] While consideration of the Resolution may be necessary to determine the scope of the federal prohibition of gaming activities, such issue is not before this Court.

[3] The State has since filed a Second Amended Complaint for Injunctive Relief; it too asserts a state law cause of action under the Texas public and common nuisance statutes. The State has never denied that it is asserting state law claims in this action.

is the same as that for determining congressional abrogation of a state's Eleventh Amendment immunity, the issue is simple: would this Court find language similar to that of section 1300g-6(c) to be sufficient to abrogate a State's Eleventh Amendment immunity? The standard being set by the Fifth Circuit directly involves every state and tribe subject to its jurisdiction.

The State further urges the Court not to issue its writ because this case impacts only one (1) tribe.[4] But what an impact. The State seeks to shut down an enterprise, causing significant, negative, economic impact not only to the Pueblo and its members, but the surrounding community of El Paso, Texas, and particularly its minority population.[5]

CONCLUSION

Petitioners respectfully request that this Court grant its petition for a writ of certiorari.

Respectfully submitted,

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[4] Actually, identical gaming provisions govern activities of the Alabama and Coushatta Indian Tribes of Texas. *See* 25 U.S.C. § 737.

[5] *See* Executive Summary of "An Evaluation of the Economic Impact of Speaking Rock Casino" by Everett G. Dillman (November 1999), in the accompanying appendix. The Pueblo has provided the State with the entirety of the report.